United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

United States Court of Appeals

United States Court of Appeals
For the
District of Columbia Circuit

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11516

FILED OCT 23 1952
789
CLERK

LOUIS FUTTERMAN, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

No. 11517

MORRIS WEISFELD, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

No. 11518

LOUIS MAIZEL, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Nos. 11516–11518

STATEMENT OF QUESTION PRESENTED

Whether Judge Morris was guilty of an abuse of discretion in refusing to vacate appellants' pleas of guilty, after they had already been sentenced, where there was clear and convincing evidence that the alleged defenses which they now raised were baseless.

227312—52——1

INDEX

	Page
Counterstatement of the facts	1
Statute and rule involved	13
Summary of argument	14
Argument:	
It was not an abuse of discretion to refuse to vacate the pleas of guilty, since appellants failed to show that a manifest injustice had been done them	14
Conclusion	18

TABLE OF CASES

United States v. *Lias*, 173 F. 2d 685 (C. A. 4)	16

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COUNTERSTATEMENT OF THE FACTS

On April 4, 1952, appellants were indicted in two counts, both charging them with knowingly receiving stolen property (J. A. 1–2). On May 19, 1952, each pleaded guilty to the second count, and the first count was dismissed at the time sentence

was imposed (J. A. 5–56). Sentences of six months to three years were imposed on July 11, 1952. Thereafter motions for leave to withdraw the pleas of guilty were filed, were heard, and were denied. The present appeal charges abuse of discretion by the trial judge in his denial of the motions to vacate the pleas.

After being indicted on April 4, 1952, appellants at first entered pleas of not guilty on April 11 (J. A. 3). Thereafter they withdrew these pleas and pleaded guilty to the second count on May 19, 1952 (J. A. 5). The following occurred in open court at that time (J. A. 5a–5b):

> Mr. MICHAEL LANE. That is the case Mr. Hitz talked to Your Honor about this morning.
>
> The COURT. Yes.
>
> Mr. LANE. And he requested that a plea to the second count—all three of them would plead to the second count of the indictment.
>
> The COURT. Let us see. Louis Maizel, this charges you with on or about August 31, 1951, in the District you did feloniously and unlawfully receive assorted groceries of the value of $1,200, property of Sam Weinstein and Morris Cohen, knowing them to have been stolen, and with the intent to defraud those people. Do you understand that charge?
>
> The DEFENDANT. Yes, sir.
>
> The COURT. Did you do that?
>
> The DEFENDANT. Yes, sir.
>
> The COURT. Do you want to plead guilty to that count?
>
> The DEFENDANT. Yes, sir.
>
> The COURT. All right. Louis Futterman?
>
> Defendant FUTTERMAN. Yes, sir.
>
> The COURT. And Morris Weisfeld?
>
> Defendant WEISFELD. Yes, sir.
>
> The COURT. This second count charges you on or about October 19, 1951, in the District with feloniously and unlawfully receiving assorted groceries of the value of about $700, the property of Samuel Weinstein and Morris Cohen, well knowing the same to have been

theretofore stolen, with the intent of defrauding the said Weinstein and Cohen. Do you understand that charge?

The DEFENDANTS. Yes, sir.

The COURT. Did you do that? Yes or no.

The DEFENDANTS. Yes, sir.

The COURT. Do you want to plead guilty to that?

The DEFENDANTS. Yes, sir.

The COURT. Take the plea.

The DEPUTY CLERK. Louis Maizel, in Criminal Case No. 573–52, in which you are charged in the second count of the indictment with receiving stolen property, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to the second count of the indictment?

Defendant MAIZEL. Yes, sir.

The DEPUTY CLERK. Louis Futterman and Morris Weisfeld, in Criminal case No. 575–52, in which you are each charged in a two count indictment with receiving stolen property, do you each wish to withdraw your pleas of not guilty heretofore entered and enter a plea of guilty to Count 2 of the indictment?

Defendant FUTTERMAN. Yes, sir.

Defendant WEISFELD. Yes, sir.

The cases were then referred to the probation office for a presentence report. On July 11, 1952, almost two months after they had changed their pleas and after numerous efforts had been made to get Judge Morris to grant them probation, appellants were sentenced to imprisonment for terms of six months to three years. On July 16, 1952, Mr. Lane filed a motion to reduce their sentences, which motion was denied the same day (J. A. 6).

On July 21, 1952, the attorneys who now represent the appellants filed motions for leave to withdraw the pleas of guilty. The grounds for these motions were that appellants did not know that the goods had been stolen from the Union Wholesale Company, and that they pleaded guilty because they understood Mr. Lane to have advised them that probation would automatically follow if they did so plead (J. A. 7–8). The

Government filed a counteraffidavit by Mr. Lane in which he swore that he had never advised appellants that probation would automatically follow upon a plea, that appellants had never told him that they had a good defense, and that, on the contrary, they told him that they were guilty (J. A. 9–11).

On July 25, 1952, Judge Morris held a long and thorough hearing on the motion to vacate the pleas of guilty (J. A. 12–86). The appellants testified that they believed the merchandise had come from a bankrupt firm in Baltimore, and they further testified that they pleaded guilty because they gained the impression from Mr. Lane that by so doing they would obtain probation.

Mr. Lane on the contrary testified as follows (J. A. 72–84): [Emphasis supplied.]

> Q. I take it you had numerous conferences with them on this matter, did you not?—A. Many.
>
> Q. *Did you ever advise them that they should withdraw their plea of not guilty, substitute a plea of guilty, so that probation would automatically follow?*—A. *No.*
>
> Q. Or words to that effect?—A. No.
>
> Q. Did these defendants ever inform you that they obtained the groceries involved legitimately in the ordinary course of business, without knowledge or suspicion that they were stolen?
>
> * * * * *
>
> The WITNESS. *They told me that they received the groceries knowing them to be stolen, and received them at half the wholesale price.*
>
> By Mr. HITZ:
>
> Q. Did any of these three defendants ever tell you that they were able to subpoena witnesses who would establish their innocence on these charges?—A. No.
>
> Q. *Did any of them ever tell you that they had a substantial and meritorious defense to the charges laid against them?*—A. *No. The only thing they told me was to try to make arrangements with the district attorney to pay the Union Wholesalers so that the Union Wholesalers may not prosecute them.*

Q. Did you coerce these defendants into pleading guilty on the day in which they withdrew their plea of not guilty?—A. No.

Q. Did you tell them that they had to do that or they'd go to jail?—A. No.

Q. And if they did plead guilty, that they would certainly not go to jail?—A. No.

* * * * *

Q. Did you give them advice, Mr. Lane, as to what information and material and documents to try to furnish to the probation officer?—A. I gave them advice to try to get as many letters as they possibly could from friends who knew them and business people who knew them.

Q. Did you say what the purpose was in getting those letters for their own recommendations?—A. Sure.

Q. What did you say the purpose was?—A. The purpose was to show to the probation officer that they were heretofore good citizens and that they were honest and sincere heretofore with their fellow man.

Q. With what object in mind?—A. With the object of possibly making probation.

Q. Did you inform them that they should tell the probation office that it was the chain stores keeping late hours that were responsible for the hardship upon their own businesses?—A. No. Mr. Futterman, Mr. Weisfeld and Maizel practically cried in my office and told me that that was the real reason why they were compelled to buy these groceries from these thieves.

Q. *Will you tell us, Mr. Lane, what if anything Mr. Maizel had to say about any arrangement he had with Ford for the purchase of groceries?*—A. *He said he had received, I think, either one or two loads at half of the wholesale price,* and that he disposed of them immediately to friends of his, and at the time that this search was made he had only two cases of pickles belonging to the Union Wholesalers in his possession.

Q. Did he state why he sold them to persons he knew

and didn't put them on his shelves?—A. Because he was afraid they were hot and he would get in trouble.

Q. Did he state at what price he sold them to his friends?—A. No, he didn't.

Q. Did he tell you what he wanted to do about making the Union Wholesalers whole?—A. *He told me that he wanted to make a settlement with the Union Wholesalers,* and he sold his house; the house was sold after he was arrested. The title was going through the title company—between the time that he was arrested and the time that title was consummated, the American Beef, I believe, brought a suit against him for $1,250, which my son represented him in. And that ate up the money that he got out of his house, the equity out of his house, the biggest part of it. And he still told me to make arrangements with the attorney representing the Union Wholesalers to pay so much a month.

Q. Was a figure ever arrived at for the monthly payment?—A. Fifty dollars a month.

Q. After Mr. Maizel received a jail sentence, did you talk to him and his wife?—A. Yes, in fact, I filed a motion before the Honorable Court here to reduce the sentence.

Q. Immediately after the sentence did you talk to him and his wife?—A. That's right.

Q. Tell us what that conversation was.—A. They thanked me for everything I had done and told me I had done everything in my power that I could do.

Q. Did they tell you in effect that you had violated any promise they said you made for probation?—A. No, no.

Q. Did they recall to you any such promise they claimed was made?—A. No.

* * * * *

Q. Did Mr. Futterman tell you anything with respect to other transactions with Ford, the thief?—A. Yes, he said they had delivered a couple of loads to his partner and his partner told him about it, or I believe he said he paid for them, I don't know now, which, I am not sure,

and he said they came along with a load there one day and he got scared and ran Ford away. And he said it was while that load was delivered that the other fellow got in trouble.

Q. What other fellow?—A. One of the defendants in one of the other cases.

Q. Either Rosso or Kitahara?—A. Rosso.

Q. Do you recall, Mr. Lane, a conversation with Mr. Adelberg with respect to the possibility of these persons going to jail and advice that Mr. Margolius had given or not given on that subject?—A. I don't understand what you mean.

Q. Did you ever talk to Mr. Adelberg and discuss the possibility that your clients might be sentenced to jail?—A. Yes.

Q. What did you say in respect to that to Mr. Adelberg?—A. *I told Mr. Adelberg that the matter looked very serious and I thought that they might go to jail.*

Q. On that same subject, did you talk to Mr. Adelberg about any possibility of Rosso going to jail?—A. I believe I did.

Q. And with respect to Mr. Margolius' advice to Rosso?—A. Yes.

Q. What was that?—A. I think that I told him that I thought Mr. Margolius should be apprized of it because I thought it was serious.

Q. *Did you inform Mr. Maizel of your apprehensions about this matter?*—A. *Advised them all.*

Q. *About the jail possibility?*—A. *Yes.*

Q. Also Futterman and Weisfeld?—A. Yes.

Q. Did a time come after you had discussed this matter with Judge Morris that you were impressed with the seriousness of the matter to your clients and the possibility of jail?—A. That's right.

Q. *Did you discuss it again with your clients after that conference with Judge Morris?*—A. Yes.

Q. What did you tell them?—A. *I told them it didn't look so good,* that I didn't know what he was going to do and he didn't tell me what he was going to do, but

that my opinion was that there would be some jail sentence.

Q. *At that time did they express to you any desire to withdraw the plea of guilty theretofore entered?*—A. *No.*

Q. Did they express to you any dissatisfaction with your representation of them?—A. No.

Q. Did they tell you that that didn't sound like automatic probation?—A. No.

Q. Is what you have just told us true with respect to all of these defendants or only some of them?—A. All three defendants.

* * * * *

Q. With reference to Mr. Futterman, did you see him shortly after sentence and have a conversation concerning the sentence with him?—A. Yes.

Q. What did he say?—A. Well, he was sorry, of course, and he was like the other three defendants, and he expressed the desire that I had done everything in my power that I could.

Q. Did he thank you for what you had done?—A. Yes.

Q. Did he tell you that it didn't look to him like automatic probation after he had been sentenced?—A. There was never any conversation about automatic probation.

Q. With respect to all three of these persons, did they nevertheless ask you to seek either a reduction of sentence or reconsideration on the matter of denial of probation?—A. That's right.

Q. They all did, didn't they?—A. That's right. I filed a motion.

Q. Mr. Lane, I have asked all of the questions I feel are worth while asking you on this subject. However, you have been allowed to sit in court and hear the testimony of these various witnesses, and if there is anything that you feel is material to the case that you should mention to enlighten the Court on our present subject or in justice to yourself as a member of the bar,

I am sure that the Court will permit you to say that, within certain reason.—A. If it please Your Honor, the only thing that I want to say is this, that after talking to Futterman and Weisfeld, and after they explained to me the manner in which the arrest was made, and the fact that *they invited them to open the store and showed them where the merchandise was,* and helped to remove the merchandise from the store into the police wagon, I felt that it was hopeless to pursue a motion to suppress the evidence.

The same thing applies to Maizel. *He took them to the store.* He only had two cases of pickles. *He showed them where they were. And he admitted to the officer—all three of them admitted to the officer that they received the property, knew the property to be stolen.*

I had an opportunity at one time to read the statements that they made to the police officer. That's all I have to say.

* * * * *

Q. Did you know, Mr. Lane, at any time after the indictments in this case, whether or not any of the thieves had admitted the sale of the groceries to these defendants and had so testified to the grand jury?—A. I did.

Q. You knew that fact?—A. Yes.

Q. Who told you that? Did I, do you happen to remember?—A. I'd have to involve a member of this bar. I'd rather not answer.

Q. In any event, did you learn?—A. *I did learn that they made statements that they took the stuff and they delivered with the full knowledge of these clients.* They knew it was stolen from the Union Wholesalers.

Q. Did you know that more than one of the thieves had testified before the grand jury, implicating these clients of yours?—A. I heard that. It was hearsay, but I was told directly by somebody——

Q. As a matter of fact, didn't I at one time tell you

that to indicate the type of evidence that we had?—A. That's right.

Q. Mr. Lane, Mr. Hughes has asked you questions about the legality of the seizure of the property and the arrest of the defendants, and about the pendency of the motion. Did you have in mind when you dismissed the motions in these cases that nevertheless the live testimony of the thieves would still be available?—A. That's right, that's right.

* * * * *

Q. Mr. Lane, did you convey to your clients the general picture, namely——A. I conveyed to them——

Q. Just a minute. Namely, that it looked extremely serious and they might go to jail?—A. That's right.

* * * * *

Appellants also testified that they had been illegally arrested and that the evidence against them had been illegally seized. The Government attempted to put the arresting officer, Eichelberger, on the stand to give his version of the arrest and seizure (J. A. 53, 58). Appellants, however, objected to the officer's testimony. Referring to this objection, Judge Morris said, "I must confess that it is amazing to me, it is a little amazing" (J. A. 54). He further said, "I am merely saying that the predicate has been laid to impeach him, and you are objecting to the impeaching testimony, and I have sustained your objection" (J. A. 55).

At the conclusion of the hearing the following occurred (J. A. 85–86; R. 184–188):

The Court. Any further evidence?

Mr. McKenzie. Your Honor, there are persons in the courtroom—they have been here—who might testify in rebuttal, but at best their testimony could only be cumulative. So I don't think we will call them.

But I want to say this to you. There is a young woman here who is a relative of the defendant Maizel, and she wishes me to state to you that she is the person who solicited persons, to me unknown, to importune you.

The Court. I know that.

Mr. McKenzie. She wanted to apologize to you.

The Court. I understand. I talked with counsel about that, afterwards. I said I regarded the case as a tragic one and I felt the deepest sympathy for the persons involved, and I am perfectly confident that the sister of Mr. Maizel, who from all I hear is a very lovely person, was frantic about the tragedy that was visited upon her, and she was anxious to do everything under the sun she could do to help.

She had no idea of any improprieties in either calling me up nor did I intimate to her I thought it was improper, except I thought it was useless, and I told her that.

I did think that some that she importuned to call up should have known better and not have done so. But I haven't the faintest resentment against her nor against Mr. Maizel on her account for what, of course, was a highly improper action but one that is thoroughly understandable in the situation, except it does show a deplorable lack of understanding as to how a court reaches a judgment, and it is awfully unfortunate that people entertain the view that conclusions of judges in courts are reached by so-called influence being exerted upon them, when, with all the conscience a judge can muster, he tries to arrive at what is a fair and proper thing to do in the circumstances, having regard for the matter before him, and the interests of the community, and the deterrent of others from such serious, serious crimes as here involved.

Is there anything further?

Mr. Hitz. Not from the Government.

Mr. McKenzie. We have no further testimony.

The Court. Well, there isn't the slightest question in my mind, not the slightest, that these defendants fully understood what they were charged with, clearly and explicitly explained to them when they were before me—had the advice of able and vigorous counsel—and having pleaded guilty, I haven't the slightest doubt in the world that counsel for these defendants, as for the others in

somewhat similar situations, all hoped and believed that they could secure probation.

They undoubtedly told their clients that they hoped and believed it, and they would do everything in the world they could to secure it. And if there is anything they could have done that they didn't do, I don't know what it is. I have never seen counsel so vigorously press for that disposition of a case.

Mr. Lane has, of course, been involved in this consideration. Mr. Lane practically wept in my office as to the hardship that would be visited upon these people.

Mr. Margolius, in the associated case—and something has been said about whether that is relevant here or not—Mr. Margolius was in all the conferences, practically, about the matter, though I do think I had a conference with Mr. Lane previous to the one I first had with Mr. Margolius, in which I intimated the view I took of this case, and that one of the penalties that is involved in a proper sentence is not only visiting just punishment upon the person that is guilty of the offense as a preventive against further wrongdoing by him, but he must pay the penalty for deterring others in the community from doing that which is so dangerous to the law and order of the community as knowingly receiving stolen property and thus being the motivation of housebreakings and larcenies that lead to the long-term imprisonment of the people from whom they buy such goods.

In the circumstances, I imposed what I thought was a just sentence, but in the circumstances an essentially lenient one, because I fixed the minimum sentence at much less than the normal minimum sentence, with the consciousness that with their previous good background they had good position to make an effective appeal for parole when they become eligible for it.

I even went so far as to state that while I never make a recommendation to a parole authority unless I am requested by the parole authority to do so, that if I was so requested, I would certainly state that I imposed the

sentence which I did with the view of giving that authority opportunity at the earliest time to consider the matter of parole, and if they felt that the subject was worthy of parole, and I had no reason to doubt otherwise, that certainly I had no objection to such treatment and felt that it would work justice in the matter.

I shall keep my promise to do that, but I shall also state the subsequent developments in this case with respect to the defendants that have seen fit to trifle with this Court.

The motions are denied. I will not be called upon any further. I heard you intimate an appeal. Of course, that is your prerogative to ask the Court of Appeals to do it. But there will be no stay of the execution of the sentence in this Court, no enlargement on bond, pending such action, made by this Court. The Court does not consider a substantial question of law or even good faith involved. Any further action must be given by the Court of Appeals.

* * * * *

A motion for bail was presented to this Court stating substantially the same argument as that now presented in the brief for appellants. This Court denied bail, for lack of a substantial question, by an order entered August 22, 1952 (Stephens, C. J. Miller, and Fahy, J. J.).

STATUTE AND RULE INVOLVED

D. C. Code (1951), § 22–2205, provides as follows:

> Any person who shall receive or buy anything of value which shall have been stolen or obtained by robbery, knowing the same to be so stolen or so obtained by robbery, with intent to defraud the owner thereof, if the thing or things received or bought shall be of the value of thirty-five dollars or upward, shall suffer imprisonment for not less than one year nor more than ten years; or if the value of the thing or things so received or bought be less than thirty-five dollars, shall suffer imprisonment for not more than two years.

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (d) *Withdrawal of plea of guilty.*—A motion to withdraw a plea of guilty or of nolo contendere must be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

SUMMARY OF ARGUMENT

When a motion is made to vacate a plea of guilty, *after sentence has been imposed,* the trial judge may grant relief only when it is made manifest that it would be an injustice to permit the plea to stand. In this case the hearing on the motion developed two completely contradictory stories. Appellants claimed that they had two good defenses and that they pleaded guilty because they were told by counsel that probation would automatically follow. Counsel, on the other hand, denied any such promise and testified that appellants had admitted their guilt to him and to the officer who arrested them. Judge Morris, who heard and saw the witnesses, disbelieved appellants. Consequently, there was no manifest injustice and it was not an abuse of discretion to deny the motion.

ARGUMENT

It was not an abuse of discretion to refuse to vacate the pleas of guilty since appellants failed to show that a manifest injustice had been done them

This is an appeal from the denial of motions to vacate pleas of guilty. As such it is controlled by Rule 32 of the Federal Rules of Criminal Procedure, which provides in pertinent part:

> (d) *Withdrawal of plea of guilty.*—A motion to withdraw a plea of guilty or of nolo contendere must be made *only before sentence* is imposed or imposition of sentence is supended; but to correct *manifest injustice* the court *after sentence* may set aside the judgment of conviction and permit the defendant to withdraw his plea. [Emphasis supplied.]

In this case sentence had already been imposed. Obviously, then, the only question before Judge Morris was whether it would be a manifest injustice to let the conviction stand upon appellants' pleas of guilty.

Judge Morris held a long and careful hearing. Eight witnesses testified, and there are almost 200 pages of testimony. These witnesses developed two completely contradictory stories. Appellants testified that they did not know the goods had been stolen, that they had been improperly arrested and the goods improperly seized, and that they had been led by Mr. Lane to believe that probation would follow automatically upon a plea of guilty. Mr. Lane, on the contrary, testified that appellants told him that they had made arrangements to buy groceries from the thieves, and that they knew at the time they received the property that it had been stolen from the Union Wholesalers; that he knew that appellants had admitted their guilt to the arresting officer and had invited him to go into their stores to look for the goods; that he knew that the thieves had made statements implicating appellants; that appellants told him to make arrangements for restitution to the Union Wholesalers; and that he never told appellants that probation would automatically follow if they pleaded guilty, but that, on the contrary, he told them, after he had discussed the question of probation with Judge Morris, that a jail sentence was probable; and that they did not thereafter request that he withdraw the guilty pleas.

Thus, the issue before Judge Morris narrowed down to a question of the credibility of the witnesses. If he believed appellants, he might have found a manifest injustice. But if he believed Mr. Lane, there was obviously no injustice. Judge Morris, who had seen and heard all the witnesses on the stand, who had heard appellants plead guilty originally, and who was aware of all the background of the case and of the great efforts made to obtain probation for appellants, believed Mr. Lane's story rather than that of appellants. Since the issue is simply credibility, there is nothing for this Court to review. We respectfully submit that appellants were manifestly guilty and that no injustice was done them.

The cases cited by appellants (Br. 28–31) are actually opposed to their present position. In all of them the court found, either upon the evidence or upon undisputed affidavits, that the plea was the result of some misrepresentation or mistake. Here, on the other hand, Judge Morris found after listening to the witnesses at great length that appellants fully understood what they were doing. One of the cases upon which appellants rely (Br. 30–31), *United States* v. *Lias,* 173 F. 2d 685 (C. A. 4), strikingly illustrates the law upon the subject. In that case the trial judge set aside the plea of guilty after sentence simply upon consideration of the defendant's affidavit. There was no hearing, and there was nothing in the record to contradict the defendant's sworn statement that he had been misled in his original plea. The Court of Appeals dismissed the Government's appeal on the ground that "it is entirely without merit in that it asks reversal of an action lying well within the discretion of the trial judge." 173 F. 2d at 688. In line with the reasoning of the *Lias* case, we respectfully submit that there can be no substantial question as to the correctness of Judge Morris' decision since he carefully heard the conflicting evidence on both sides, and since his decision depended largely upon the demeanor of the witnesses who appeared before him.

In order to establish that they had been subjected to manifest injustice appellants needed to prove to Judge Morris that there was doubt as to their guilt and that the issue should be submitted to trial. They claimed to have two defenses: first, that they did not know the goods were stolen; and, second, that the seized evidence should have been suppressed. They attempted to develop the first by their own testimony at the hearing. But they were flatly contradicted on all essentials by Mr. Lane; all efforts to shake his testimony on cross-examination failed; and he was corroborated in highly important respects by Adelberg, the attorney for the Union Wholesalers, and by the recollection of Judge Morris himself (compare J. A. 59–61, 77–78, 85). Since Judge Morris believed Mr. Lane, the first defense is baseless. Appellants also developed their second claimed defense by their own testimony. But when the Government put Officer Eichelberger on the stand to relate his version of the arrest and seizure—appellants ob-

jected to his testimony! How, then, could Judge Morris determine whether this second defense[1] had any validity? And how can appellants now claim that they were subjected to manifest injustice?

With respect to the argument presented in appellants' brief we submit the following brief comments:

1–2. (Br. 13–19.) It is true that appellants at first told the probation officer that they believed the groceries brought by the thieves were distressed merchandise from Baltimore. However, this caused the probation officer to point out that, if this was their story, they would have to withdraw their guilty plea and stand trial[2] (J. A. 16–17, 66–68; R. 27–28, 148–162). He then asked them again whether they had done the things they were charged with in the indictment, and they admitted that they had (R. 148–149, 160–161, 162, 166). Obviously appellants were trying to put their case in the best light when they first appeared before the probation officer, but when faced with the fact that they would have to stand trial if they persisted in their story they admitted that it was not true. Furthermore, despite the assertion that the probation officer never informed Judge Morris of appellants' claim, we submit that the most

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[1] In view of the evidence of appellants' admissions of guilt, it may be doubted whether they can avail themselves of this purely technical defense, after having pleaded guilty and been sentenced.

[2] Appellant Maizel testified (J. A. 17):

"Q. Let's do it your way. What did you tell the probation officer when you went in to see him?—A. That the merchandise that I was supposed to have purchased I did not know was stolen, I did not know where it came from. The boys told me they purchased it from Baltimore at a place that went bankrupt. It wasn't much, and I figured it was all right. Then he stopped me. Q. And what did he say?—A. He said if this is my story, he can't accept a guilty plea. Q. What did you say?—A. He said, I am going to have to go back to Court, and I said, 'I don't want to mess up any arrangements, if you made any, for probation.' and have to let it go as it was. See, I was threatened, if we didn't plead guilty, we'd go to jail. I was afraid of that." * * *

The probation officer, Vogt, testified (J. A. 67):

"Q. Did Mr. Maizel at any time protest to you that he was not guilty of this charge?—A. No, sir. We couldn't write the case, sir, if that were the case, because we can't enter a plea of guilty, we can't write a man's case if he doesn't admit the facts as they are. We would have to refer him back to his attorney."

logical inference to be drawn from the record is that it *was* the probation officer who first imparted the knowledge to Judge Morris when he presented his presentence report.

3–4. (Br. 19–22.) Moreover, it is really immaterial whether the probation officer told Judge Morris or not, since it is perfectly clear, and appellants so admit, that the judge was aware of the claim that had been advanced. Judge Morris told counsel for all the defendants that he wanted the plea withdrawn, *if*, and only *if*, there was any doubt as to their guilt (J. A. 64, 83). But there was no such doubt, since they had told Mr. Lane, whose testimony Judge Morris believed, that they were guilty, and since Mr. Lane had warned them that a jail sentence was likely. Mr. Lane's activities were properly devoted to an attempt to obtain probation since he knew there was no defense.

5–6. (Br. 22–32.) As we have already pointed out, Judge Morris was not given a proper opportunity to determine whether there was any basis to the claim of illegal arrest and seizure, since appellants objected to him hearing the testimony of the arresting officer. Furthermore, it clearly appears from the testimony of Mr. Lane that the claim was baseless.

CONCLUSION

We respectfully submit that the charge of abuse of discretion in this case is utterly without substance, and that the judgment should be affirmed.

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